

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

DESHAUN MCCOULLUGH #248049,

Plaintiff,

v.

Case No. 2:08-cv-70
HON. R. ALLAN EDGAR

GREG MCQUIGGIN, et al.,

Defendants.

/

OPINION AND ORDER APPROVING MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION

The Court has reviewed the Report and Recommendation filed by the United States Magistrate Judge on August 20, 2009. The Report and Recommendation was duly served on the parties. The Court received objections from the Plaintiff. In accordance with 28 U.S.C. § 636(b)(1), the Court has performed *de novo* consideration of those portions of the Report and Recommendation to which objection has been made. The Court now finds the objections to be without merit.

In his objections, Plaintiff asserts that the Magistrate Judge improperly applied the total exhaustion rule. However, a review of the report and recommendation in this case reveals that Plaintiff is mistaken. Rather, the Magistrate Judge found that Plaintiff had failed to exhaust his remedies on his ETS claim with regard to Defendants Caruso, Meni, or Gajewski, and that he also failed to exhaust his administrative remedies with regard to his retaliation claims. Therefore, the Magistrate Judge properly recommended that Defendants be granted summary judgment on these claims. However, the Magistrate Judge then addressed the merits of Plaintiff's remaining claims.

Plaintiff also contends that the Magistrate Judge erred in recommending summary judgment on his claims that he was exposed to environmental tobacco smoke (ETS) in violation of his rights under the Eighth Amendment. However, Plaintiff merely reasserts his prior allegations in support of this assertion. As noted by the Magistrate Judge, Defendants supported their motion with copies of four minor misconduct violation and hearing reports, showing that Plaintiff was caught smoking and / or possessing tobacco on four separate occasions, as well as the affidavits of Defendants Gajewski and Tibley, showing that they took appropriate measures to protect Plaintiff from ETS exposure. Accordingly, the Magistrate Judge properly found that Defendants were entitled to summary judgment on this claim.

THEREFORE, IT IS ORDERED that the Report and Recommendation of the Magistrate Judge is approved and adopted as the opinion of the court and Defendants' motion for summary judgment (docket #35) will be GRANTED and Plaintiff's action will be dismissed in its entirety.

IT IS FURTHER ORDERED that Plaintiff's motion to produce documents (docket #63) is DENIED.

FINALLY, IT IS ORDERED that an appeal of this action would not be in good faith within the meaning of 28 U.S.C. § 1915(a)(3). *See McGore v. Wrigglesworth*, 114 F.3d 601, 611 (6th Cir. 1997). For the same reasons that the Court dismisses the action, the Court discerns no good-faith basis for an appeal. Should plaintiff appeal this decision, the Court will assess the \$455 appellate filing fee pursuant to § 1915(b)(1), *see McGore*, 114 F.3d at 610-11, unless plaintiff is barred from proceeding *in forma pauperis*, e.g., by the "three-strikes" rule of § 1915(g). If he is barred, he will be required to pay the \$455 appellate filing fee in one lump sum. Accordingly, should

plaintiff seek to appeal this matter to the Sixth Circuit, the appeal would be frivolous and not taken in good faith.

Dated: 9/21/09

/s/ R. Allan Edgar
R. ALLAN EDGAR
UNITED STATES DISTRICT JUDGE